

Decision 01-08-011 August 2, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks.

Rulemaking 93-04-003
(Filed April 7, 1993)

Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks.

Investigation 93-04-002
(Filed April 7, 1993)

OPINION ON REQUEST FOR INTERVENOR COMPENSATION

This decision awards The Utility Reform Network (TURN) \$14,727.00 in compensation for contributions to Decision (D.) 00-09-074.

1. Background

Rulemaking (R.) 93-04-003 and Investigation (I.) 93-04-002 were initiated in April, 1993, to separately price, or "unbundle," local exchange networks as a means of promoting competition for telecommunications services. Often referred to as Open Access and Network Architecture Development (OANAD), the proceeding has had several phases and accompanying decisions. In D.00-09-074, the decision that is the subject of this compensation request, the Commission approved the results reached in the Final Arbitrator's Report (FAR) addressing interim prices and terms for the introduction of Digital Subscriber Line (DSL) line sharing by Pacific Bell (Pacific) and Verizon California (Verizon). Among other issues, the decision and FAR both conclude that there should be a charge for the use of the high frequency portion of the loop (HFPL) and that

revenues from such loop charges by Pacific and Verizon should be tracked in a memorandum account for potential refund to voice customers.

By a Request for Award of Compensation (Request) timely filed on November 21, 2000, TURN presents a claim for compensation for substantial contributions to D.00-09-074. Pacific filed a Response to Request for Compensation (Response) on December 21, 2000.

2. Procedural Matters

Pursuant to Rule 77.7(f)(6) of the Commission's Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment is being waived.

3. Requirements for Awards of Compensation

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to Pub. Util. Code §§ 1801-1812.¹ Section 1804(a) requires an intervenor to file a notice of intent (NOI) to claim compensation within 30 days of the prehearing conference (PHC) or by a date established by the Commission. The NOI must present information regarding the nature and extent of planned participation in the proceeding, and an itemized estimate of compensation that the customer expects to request. The NOI may also request a finding of eligibility.

Other sections address requests for compensation filed after a Commission decision is issued. Section 1804(c) requires an eligible customer to file a request for an award within 60 days of the issuance of a final order or decision by the

¹ Unless otherwise noted, all statutory citations are to the Pub. Util. Code.

Commission in the proceeding. An intervenor requesting compensation must provide “a detailed description of services and expenditures and a description of the customer’s substantial contribution to the hearing or proceeding.” Section 1802(h) states that “substantial contribution” means that,

“in the judgement of the commission, the customer’s presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer’s participation has resulted in a substantial contribution, even if the decision adopts that customer’s contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate’s fees, reasonable expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation.”

Section 1804(e) requires the Commission to issue a decision which determines whether or not the customer has made a substantial contribution and the amount of compensation to be paid. The level of compensation must take into account the market rate paid to people with comparable training and experience who offer similar services, consistent with Section 1806.

4. NOI to Claim Compensation

TURN was found eligible for compensation in this proceeding in an Administrative Law Judge’s Ruling on February 15, 1995, and was awarded compensation for earlier contributions in this proceeding in D.96-11-040 and D.00-07-016. Pursuant to Rule 76.76, TURN remains eligible for compensation for its participation in this same proceeding. (Rule 76.76 of the Rules of Practice

and Procedure.) Within the 60 days allowed following issuance of D.00-09-074 TURN filed its timely Request (Section 1804(c)).

5. Contribution to Resolution of Issues

TURN contends that it made substantial contributions to the D.00-09-074 in four subject areas. The four areas are the effect of a federal statute (47 U.S.C. Section 254(k)), the need for memorandum accounts, the impact of revamping network for data transmission, and the need to address incumbent local exchange carrier (ILEC) double recovery in the final portion of the line sharing phase. We agree that TURN made substantial contributions in these areas.

On the issue of the federal statutory requirements, we conclude that the FAR includes language not present in the Draft Arbitrator's Report (DAR) as a result of opening comments filed by TURN. TURN argued that the federal statute supports the imposition of a charge for the line-shared loop, but that with the introduction of line sharing the same local loop will be used on a shared basis by both voice and data services. TURN contended that voice service should not be required to bear the full cost of the loop, and that DSL services should contribute to the recovery of loop costs. Although the FAR does not name TURN, it is clear that the discussion on this issue was added to the FAR in response to TURN's comments.

The DAR did not contain a provision for balancing accounts. In its comments TURN argued that memorandum accounts should be required to track loop revenues received from DSL line sharing in order to prevent a windfall to Pacific and Verizon. The FAR includes mandated memorandum accounts. We conclude that this provision is attributable at least in part to TURN's participation.

Similarly, we find that TURN's reply comments on the DAR contributed to the conclusion in the FAR that it is not unreasonable for loop costs to be attributed to data as well as voice service. TURN had argued that cost causation principles require that loop costs be shared by data services (such as DSL) and voice grade services because the loop plant in ILEC networks is being redesigned for optimal data transmission, such as via DSL services. TURN's participation contributed to the treatment of this issue in D.00-09-074.

Lastly, the Commission was persuaded by TURN's argument that the final portion of the current phase of the proceeding should address the issue of potential ILEC double recovery of loop costs. In this regard, D.00-09-074 confirmed a February 25, 2000 ruling that credited TURN with raising the issue of the need to consider the issue of double recovery.

The above participation by TURN amply supports a conclusion that TURN made substantial contributions to D.00-09-074.

6. Customer Interests Represented and Duplication of Effort

In a decision in which we generically reviewed many of our policies on intervenor compensation, we directed that an NOI must contain information that enables the presiding officer to make a preliminary assessment of whether an intervenor will represent customer interests that would otherwise be underrepresented. Additional assessment of this issue is to occur in response to any request for compensation. (D.98-04-059, pp. 27-28, Finding of Fact 13.) TURN submits that it was the only ratepayer representative in this phase of the case to represent the interests of residential and small business customers on the issues to which it contributed. The other ratepayer representative, the Office of Ratepayer Advocates (ORA), did not focus on loop pricing issues to the same

extent as TURN, and did not propose a memorandum account. We agree with TURN that without its participation the interests of residential and small commercial customers would have been underrepresented on these issues.

We reject the contention of Pacific in its Response that TURN's work was unnecessary and duplicative of work of other parties. Pacific argues that the single largest cost incurred by TURN was for attendance at the arbitration hearings. (The total charges for this activity are approximately \$3,660 for 22 hours of staff time.) We disagree that this time was ill spent or excessive. We would not have expected TURN to file comments in this proceeding without fully informing itself regarding the development of issues in the case. We find TURN's decision to attend the arbitration hearings reasonable.

We are also not persuaded that the award to TURN should be reduced on the basis that its efforts duplicated those of Pacific. We do not find the concurrence of position between Pacific witnesses and TURN on a few issues to be the type of duplication that justifies a discounted award. TURN's arguments were not identical to those of Pacific's witnesses, and were presented on behalf of consumers. They were especially useful to the Commission because they appeared in the form of comments that clearly highlighted the issues of concern. We find no discount of the award is justified.

7. Benefits to Ratepayers

In D.98-04-059, Finding of Fact 42, we indicated that compensation for a customer's participation should be in proportion to the benefit ratepayers receive as a result of that participation. We recognized that putting a dollar value on the benefits accruing to ratepayers as the result of a customer's substantial contribution maybe difficult. However, an assessment of whether the requested compensation is in proportion to the benefits achieved helps ensure that ratepayers receive value from compensated intervention, and that only reasonable costs are compensated. (*Id.*, p. 73.)

It is not possible to quantify precisely the benefits to ratepayers of TURN's participation in this proceeding. TURN's contribution focussed on the future terms and

pricing for DSL line sharing. The outcome of these issues will have an impact on the rates paid by voice customers and data customers. Specifically, TURN's participation helped ensure that recovery of loop costs does not fall solely on voice service and that utilities do not realize a windfall from loop revenues. Both of these contributions should benefit the residential and small business customers TURN represents. An award of \$15,477 to compensate TURN for its efforts to ensure that the rates fairly allocate the costs of data service is a reasonable investment by ratepayers.

7.1 The Reasonableness of Requested Compensation

TURN requests compensation in the amount of \$15,477.00 as follows:

Advocates Fees

T. Long, Attorney

| | | |
|-------------------------------------|---|-------------|
| 5.00 hours @ \$300/hr. (2000) | = | \$ 1,500.00 |
| 11.00 hours @ \$150/hr. (fee prep.) | = | \$ 1,650.00 |

R. Costa

| | | |
|--------------------------------|---|-------------|
| 74.50 hours @ \$160/hr. (2000) | = | \$11,920.00 |
| Subtotal | = | \$15,070.00 |

Other Costs

| | | |
|-------------|---|-----------|
| Photocopies | = | \$ 358.00 |
| Postage | = | \$ 49.00 |
| Subtotal | = | \$ 407.00 |

| | | |
|--------------|---|-------------|
| Total | = | \$15,477.00 |
|--------------|---|-------------|

7.2 Hours Claimed

TURN has segregated its hours by activity in accordance with Commission guidelines. The time spent by Long in preparing the intervenor compensation request is charged at one half of his approved hourly rate. This is consistent with our direction in D.98-04-059. Except for the number of hours spent preparing the compensation request, the hours billed by TURN appear reasonable and are fully compensable. We will compensate TURN for six of the 11 hours claimed for preparing the intervenor request. We find that given the limited number of hours tracked and TURN's past expense preparing intervenor compensation awards, six hours is a fair and reasonable number of hours for preparing the compensation request. Thus, we shall reduce TURN's advocate fees by \$750 (5 hrs. x \$150/hr.).

7.3 Hourly Rates

TURN claims an hourly rate of \$300 per hour for work performed by Long in 2000. The last approved hourly rate for Long is \$260 per hour for 1998, adopted in D.99-07-045. TURN provides information regarding prevailing market rates for attorneys to justify the requested increase in hourly rate. Based upon the information provided by TURN, and the extensive experience of Long before this Commission, it is reasonable to increase his hourly rate as proposed for work performed in 2000. TURN has reduced Long's hourly rate by 50% to \$150 per hour for preparation of the compensation request.

TURN proposes an hourly rate of \$160 per hour for Costa, TURN's Telecommunications Research Director. The previously approved hourly rate for Costa is \$140 per hour for work performed in 1996-1999. TURN provides information regarding Costa's experience and market rate analysis for comparable services in support of the requested hourly rate increase. We find the rate increase reasonable. Costa was TURN's primary representative in this proceeding, serving as both policy analyst and advocate. Senior attorney Long was able to take a limited role in the case because of Costa's level of experience. Thus, the bulk of TURN's work was performed by Costa, at

a lower hourly billing rate. We adopt the requested \$160 hourly rate for Costa for work performed in 2000.

7.4 Other Costs

TURN requests \$407.00 for the costs of photocopies and postage. The expenses are itemized in the Request. The expenses are reasonable and fully compensable.

7.5 Award

We award \$14,727.00 to TURN for its contributions to D.00-09-074. The award is calculated as follows:

| | |
|---------------------------------|-------------|
| Advocates Fees | \$14,320.00 |
| Other Costs | \$ 407.00 |
| <u>Total Compensation Award</u> | \$14,727.00 |

Consistent with previous Commission decisions, we will order that interest be paid on the award amount (calculated at the three-month commercial paper rate), commencing the 75th day after TURN filed its compensation request and continuing until full payment is made.

As in all intervenor compensation decisions we put TURN on notice that the Commission's staff may audit TURN records related to this award. Thus, TURN must make and retain adequate accounting and other documentation to support its claim for intervenor compensation. TURN's records should identify specific issues for which it requests compensation, the actual time spent by each employee, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation is claimed.

8. Payment of Award

In D.00-01-020, we addressed the issue of the payment of intervenor compensation awards in quasi-legislative proceedings affecting an industry or multiple industries. We stated our intent that no later than July 1, 2001, awards in quasi-legislative rulemaking proceedings where no specific respondents are named will be paid

from an intervenor compensation program fund. The details of this funding method are set forth in D.00-01-020.

The OANAD proceeding is quasi-legislative in nature affecting the telecommunications industry. There is no named respondent. Accordingly the award to TURN shall be paid from the intervenor compensation program fund.

Findings of Fact

1. TURN has previously been found eligible for compensation in this proceeding in D.96-11-040.
2. TURN has made a timely request for compensation for its contributions to D.00-09-074.
3. TURN made substantial contributions to D.00-09-074.
4. TURN represented customer interests that would otherwise have been underrepresented. There is no duplication of effort to warrant a reduction in the award.
5. The benefits to customers of TURN's participation outweigh the costs of funding TURN's participation.
6. The hourly rates requested for work performed by Long and Costa are consistent with market rates and are reasonable.
7. Except for five hours spent preparing the compensation request, the advocate fees and other costs incurred by TURN in this proceeding are reasonable and fully compensable.
8. This proceeding is a quasi-legislative proceeding that affects the telecommunications industry. There is no named respondent.

Conclusions of Law

1. TURN has fulfilled the requirements of Pub. Util. Code §§ 1801-1812, which govern awards of intervenor compensation.
2. TURN should be awarded \$14,727.00 for its contributions to D.00-09-074.
3. Pursuant to Rule 77(f)(6) of the Commission's Rule of Practice and Procedure, the comment period for this compensation decision may be waived.

4. This order should be effective today so that TURN maybe compensated without undue delay.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) is awarded \$14.727.00 as set forth herein for substantial contributions to Decision (D.) 00-09-074.
2. The award shall be paid from the intervenor compensation program fund, as described in D.00-01-020.
3. Payment of the award shall include interest at the rate earned on prime, three-month commercial paper as reported in the Federal Reserve Statistical Release G.13, with interest beginning on February 4, 2001, and continuing until the full payment has been made.

4. The period for public review and comment is waived.

This order is effective today.

Dated August 2, 2001, at San Francisco, California.

LORETTA M. LYNCH

President

RICHARD A. BILAS

CARL W. WOOD

GEOFFREY F. BROWN

Commissioners

Commissioner Henry M. Duque, being necessarily absent, did not participate.